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U.S. Citizenship  
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FILE:



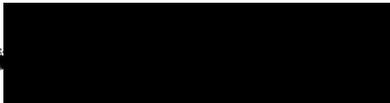
EAC 02 168 50342

Office: VERMONT SERVICE CENTER

Date: FEB 15 2005

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

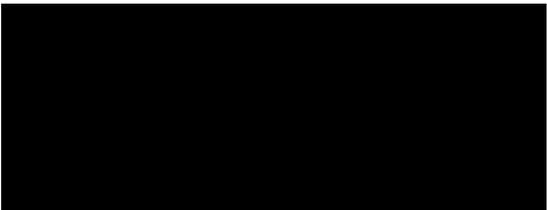
ON BEHALF OF PETITIONER:

Self-Represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office



**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private school. It seeks to employ the beneficiary as a daycare center director. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner<sup>1</sup> asserts that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. See 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is July 16, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of programmer/analyst. In the instant case, item 14 shows the required number of years and type of educational background and experience an applicant for the position must possess. It states the following:

- |     |                            |                                |
|-----|----------------------------|--------------------------------|
| 14. | Education                  |                                |
|     | College                    |                                |
|     | College Degree Required    | B.A.                           |
|     | Major Field of Study       | Early Childhood Development    |
|     | Experience                 |                                |
|     | Job Offered                | 3 yrs                          |
|     | Related Occupation         | 3 yrs Day Nursery Care Teacher |
| 15. | Other Special Requirements | none                           |

Part B of the ETA 750, signed by the beneficiary on June 22, 2001, indicates that she studied special education at Stevenson College in Great Britain from August 1993 until June 1994 and acquired an

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<sup>1</sup> Although the record contains a G-28, Notice of Entry of Appearance as Attorney or Representative, the petitioner filed the appeal itself. As no withdrawal of representation has been submitted, a copy of this decision will be provided to the attorney of record.

“Advanced S.E. Certification.” She also studied at Bathgate Tech in Great Britain from August 1985 until August 1987 and obtained a “Nursery Nurse Certificate.”

As evidence of the beneficiary’s formal education, the petitioner submitted only a copy of an evaluation report from [REDACTED] of the International Services, Inc., dated April 1, 1996. Mr. [REDACTED] various certificates that the beneficiary has obtained as well as her resume. He concludes:

In summary, it is the judgement of the Foundation that [the beneficiary] has the equivalent of graduation from high school in the United States, an associate’s degree (two years) in child care from an accredited community college in the United States and has, as a result of her educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor’s degree in child care with an emphasis in special education from an accredited college or university in the United States. Furthermore, [the beneficiary] is a registered child care giver in the United Kingdom.

On July 26, 2002, the director requested additional evidence from the petitioner establishing that the beneficiary has the required education set forth in the ETA 750A. The director advised the petitioner that any evaluation must consider formal education only, not practical experience, specify if the collegiate training was post-secondary education, provide a detailed explanation of the material evaluated, and briefly state the qualifications of the evaluator. The director further informed the petitioner that while work experience may be used in processing a petition for a non-immigrant worker, only formal education may be used in determining an employment based immigrant petition.

In response, counsel for the petitioner entered an appearance and explained in her transmittal letter, dated October 18, 2002, that the petitioner had failed to correctly describe the educational requirements on the labor certification and that the recruitment had not restricted applicants without bachelor degrees. To illustrate, counsel submitted a copy of a newspaper advertisement for a job fair held at the petitioner’s place of business in April 2001, which advertised positions for “Pre-School,-8<sup>th</sup> Grade Teachers, Aides and Summer Counselors,” but omitted any mention of a position for a daycare center director, as well as a copy of a notice of filing of a “labor condition application.” It states that it is seeking two “H-1B nonimmigrant workers” for positions as a Kindergarten Teacher/Director. No other evidence relating to the beneficiary’s academic credentials was offered.

The director denied the petition on February 13, 2003. The director found that the evidence submitted did not meet the requirements of the approved labor certification because the beneficiary does not possess a U.S. bachelor’s degree in Early Childhood Development or a foreign bachelor’s degree that is equivalent to a U.S. bachelor of arts degree in this specialty.

On appeal, the petitioner submits various copies of the beneficiary’s 1985-1987 transcript of courses sponsored by the Scottish Vocational Education Council, as well as a community care course attended for three weeks in 1983, a certificate of education issued in 1982 by the Whitburn Academy in Scotland, and a record of a French course attended in 1980. The petitioner’s letter accompanying these submissions, emphasizes that the beneficiary’s experience and education qualifies her for the position offered of daycare center director. A subsequent submission includes a letter from a licensing inspector of the Dept. of Social Services in Virginia stating that the beneficiary meets the licensing standards of a “Program Director

Qualifications A.2.” “An endorsement or bachelor’s degree in a child related field from an accredited college or university and one year of programmatic experience in the group care of children.” An accompanying letter from the principal of the petitioner states that they were inexperienced in filing documentation for permanent residency for alien workers but felt that the beneficiary was best qualified among those who responded to the recruitment.

The petitioner’s assertion is not persuasive. As noted by the director, CIS is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(ii) of the Act. At the outset, it is noted that CIS, not the Department of Labor or the Virginia Dept of Social Services, that has final authority with regard to determining an alien’s qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien’s credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1<sup>st</sup> Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree, even where a classification may not require a bachelor’s degree. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) provides in pertinent part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

The above regulation uses the singular description of a foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The labor certification and regulation cited above clearly requires an applicant for the position of daycare center director to have a U.S. bachelor’s or foreign equivalent degree. A bachelor’s degree is generally found to require 4 years of education. *Matter of Shah*, 17 IYN Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary’s past work experience may not be substituted for a four-year degree. The record does not contain an official college or university record showing that the beneficiary possesses a baccalaureate degree from any institution of higher learning either abroad or in the United States as required by 8 C.F.R. § 204.5(l)(3)(ii)(C). Moreover, it is noted that the documentation submitted representing courses taken by the beneficiary from 1980 to 1983 are otherwise problematic because they do not represent post-secondary studies, but rather were attended when the beneficiary was fourteen to seventeen years of age.

The record contains an evaluation from International Services, Inc., which combines the beneficiary's work experience and academic studies to conclude that she has the equivalent of a U.S. bachelor's degree in child care/special education from an accredited university in the United States. The Virginia licensing inspector's letter suggests that the beneficiary can meet the licensing requirements through an endorsement or a bachelor's degree plus one year of experience. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a United States bachelor's degree or a foreign equivalent degree as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.